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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

CHICOT COUNTY DRAINAGE DISTRICT, *Petitioner,*

v.

No. 122

THE BAXTER STATE BANK AND MRS. LENA S. SHIELDS, *Respondents.*

REPLY BRIEF FOR PETITIONER

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TABLE OF CASES CITED

TEXT BOOKS

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The brief for respondents does not touch upon the questions which we conceive to be involved in this case. Their brief seems to be directed to the question as to what respect should be accorded an unconstitutional act. They argue that such an act is not effective to accomplish any purpose whatsoever, and as a general rule we admit that that is true.

However, this does not meet the present proposition. In our humble opinion, the question here is what respect should be accorded a *judgment* rendered on a claim based on an unconstitutional act. In other words, the question is the effect of the judgment and not the effect of the act itself.

Respondents appear content to rest their case upon the decision of the Court of Appeals, and on page 4 of their brief make reference to the cases cited by that court to sustain its opinion. In our petition for certiorari, at pages

19 and 20, we distinguished the cases of *Chicago I. & L. R. Co.* v. *Hackett*, 228 U. S. 559, 57 L. Ed. 966 (1913), and *Security Savings Bank* v. *Connell*, 198 Iowa 564, 200 N. W. 8 (1924). The Court of Appeals also cited *McDonald* v. *Mabee*, 243 U. S. 90, 61 L. Ed. 608 (1917), and *Norton* v. *Shelby County*, 118 U. S. 425, 30 L. Ed. 178 (1886). Neither of these cases touches upon the proposition involved here. The remaining case cited by the Court of Appeals is *Servonitz* v. *State*, 133 Wis. 231, 113 N. W. 277 (1907), which merely holds that a convicted prisoner may by *habeas corpus* proceedings test the constitutionality of the statute for violation of which he was convicted. The reason behind this rule is stated by Mr. Justice Bradley in Ex Parte *Siebold*, 100 U. S. 376, 25 L. Ed. 717, 719 (1880):

> "But personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that, as we have seen, the question of the court's authority to try and imprison the party may be reviewed on *habeas corpus* by a superior court or judge having authority to award the writ."

It is only in unusual circumstances that the writ is allowed, and we do not believe that this situation is comparable to the one presented in the case at bar. It should be noted that respondents have been unable to point out any case in which a litigant has been allowed to go behind a prior judgment in a case of this nature. In our main brief we have called the court's attention to a number of decisions where this court and others have refused to allow such procedure.

Respondents apparently treat with contempt any suggestion that an unconstitutional act could affect their rights or liabilities in any manner. We submit, however, that their

predicament is of their own making. They have allowed themselves to get in the same position as did the respondents in the case of *Reed* v. *Allen*, 286 U. S. 191, 52 S. Ct. 532, 76 L. Ed. 1054 (1932), cited on page 13 of our main brief. Their path was clearly marked out for them. Had they resorted to the simple expedient of an appeal from the prior judgment, this case would never have arisen. Why, for the sole benefit of the respondents here, should this court make an exception to the long-established doctrine of *res judicata*?

The doctrine applies to questions of law as well as questions of fact.

> *United States* v. *Mosely*, 266 U. S. 236, 242, 69 L. Ed. 262, 264 (1924).

It should be cordially regarded and enforced by the courts to the end that rights once established by final judgment shall be recognized by those who are bound by it.

> *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U. S. 294, 299; 61 L. Ed. 1149, 1153 (1917).

> "An adjudication as to constitutionality of a law upon which a claim or cause of action is based is *res judicata* so far as that claim or cause of action is concerned, even though in another case in a higher court the law is adjudged constitutional. * * * So far as the rights determined in an action depend upon the constitutionality of a particular law, the judgment is conclusive with respect to those rights in any subsequent action, except as the issue of constitutionality may be affected by changed conditions." Freeman on Judgments, Fifth Edition, Section 711, pages 1499, 1500.

The same authority makes the following statement in Section 710, page 1498:

> "Questions of jurisdiction may become *res judicata* the same as any other matters of law or fact where they are properly in issue or are necessarily involved and determined."

The only authority cited by respondents to support their position in this case is part of a quotation from 11 American Jurisprudence, set out on page 5 of respondents' brief, as follows:

> "A judgment of any court which is based on an unconstitutional law—it has been said—has no legitimate basis at all and is not to be treated as a judgment of a competent tribune."

This statement itself is qualified and is of doubtful authority. In support thereof the text cites the Connell case and the Servonitz case. These cases have already been distinguished. The text, therefore, has nothing to support it.

The Court of Appeals in its opinion referred to Black on Judgments, Volume 1, Section 216, and apparently placed some reliance upon the statement contained therein. We again state that the rule as set out therein may be correct as a general proposition, but the general rule does not cover a situation such as this one. We believe the following quotation is more applicable to this case:

> "The fact that its own jurisdiction may become a matter in issue before the court, or a question which it must determine before proceeding with the case, and then its decision that it has jurisdiction is generally considered final and conclusive in all collateral inquiries. When the jurisdiction of a court depends upon a fact which it is required to ascertain in its decision, such decision is binding until reversed in a direct proceeding." Black on Judgments, Section 274.

We are unable to think of any substantial reason why the doctrine of *res judicata* should not apply in this case. Throughout the course of this litigation no such reason has been advanced as to why the rule should not apply.

Congress attempted to confer jurisdiction upon the district courts. Congress had the right and the power to confer such jurisdiction, and it was only through inadvertence that Congress did not accomplish its purpose. The Federal District Court certainly had the right and the power to pass upon its own jurisdiction in this case. Questions of jurisdiction, like all other questions of law and fact arising in litigation, must be adjudicated somewhere, and it is equally essential that such adjudication possess the quality of finality and conclusiveness. Whenever a court, whether inferior or superior, trial or appellate, is given the power to entertain such questions, we know of no valid reason why its adjudication should not be conclusive as against either persons or things over whom the court's authority has been extended. Some court must be given the authority to finally and conclusively adjudicate the question. The respondents argue here that the trial court's adjudication of its own jurisdiction is not conclusive. Yet they went back to the very same court which rendered that adjudication and asked that it make a second adjudication holding that its first decision was void. Why should this second adjudication be entitled to any greater respect than the first? We submit that it is entitled to no greater respect, and that the first adjudication is binding upon it and upon these respondents.

It is true that between these two adjudications by the district court there intervened a decision by this court,

to-wit, the Ashton case. This, however, should have no bearing on the issue. We are concerned here not with right decision, but with the right to decide. So far as this case is concerned, it should be decided without reference to the decision in the Ashton case.

Any other rule leaves the question of jurisdiction incapable of final adjudication except as to those persons who have actually subsequently litigated it. The mischiefs which may result from such a situation are obvious especially where, as here, the original adjudication was one *in rem*. In such cases the question of jurisdiction could never become *res judicata*, and would be conclusive only as a result of other proceedings *in personam*, and even then binding only on the parties to such an action and their privies.

This is a typical case of invoking a judgment settling the construction of a written instrument—the first municipal bankruptcy act. There was a sufficient degree of uncertainty in the instrument to call for judicial construction. The question was a narrow one. The district court by its judgment settled this question. There was no appeal. The respondents then returned to that same district court, and in a separate suit asked that court to reexamine the merits of its prior judgment and to render a new judgment inconsistent with its prior decree. The district court did this and in so doing, we submit, the court violated one of the basic principles of the law, "not a mere matter of practice or procedure * * * a rule of fundamental and substantial jus-

tice, 'of public policy and private peace,' which should be cordially regarded and enforced by the courts * * *."

Hart Steel Co. v. *Railroad Supply Co.*, 244 U. S. 294, 299; 61 L. Ed. 1149, 1153 (1917).

Respectfully submitted,

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